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October Term, [redacted] 1970

No. 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE H. SCHY
9225 Collins Avenue
Surfside, Florida 33154,
Petitioner pro se.

MIAMI REVIEW — 371-4853 — 377-3721

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner MAURICE H. SCHY prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 5, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 419 F.2d 1112 and is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1970. On January 19, 1970, petitioner filed a petition for rehearing which the Court of Appeals denied by order entered January 27, 1970. On April 11, 1970, petitioner applied to the Honorable Thurgood Marshall, Associate Justice of the Court, for an extension of time to petition for certiorari and the time therefore was enlarged to May 25, 1970. On May 8, 1970, petitioner again applied to the Honorable Thurgood Marshall for an additional extension of time to petition for certiorari and the time therefore was further enlarged to June 26, 1970. The jurisdiction of the Court to review the decision of the Court of Appeals by writ of certiorari is pursuant to 28 U.S.C. §1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals on the issues of causation and damages in an action under Section 14(a) of the Securities Exchange Act of 1934, which is contra to the law as declared by the Court, should be allowed to stand?

2. Whether the Court of Appeals has so far sanctioned the court's departure from the accepted and usual course of judicial proceedings as to call for an exercise by the Court of its power of supervision, in view of the following:

(a) The court's dismissal of the complaint with prejudice under Rule 12(b)(6) on a ground not embraced within the ambit of the rule and without granting petitioner an opportunity to file counter affidavits or present material made pertinent to such a motion by Rule 56;

(b) The court's denial of leave to petitioner to amend and supplement his complaint, in order to meet a deficiency in the pleading raised by the court itself upon oral argument on respondents' motion to dismiss, in derrogation of the letter and spirit of Rule 15(a); and

(c) the court's disqualification of petitioner as a class representative by going outside the specific procedures of Rule 23(a)(3) and 23(a)(4) to do so.

(d) the court's improper extension to class actions of Rule 23.1 which, by its terms, is applicable only to derivative suits and not to class actions.

3. Whether the act of disseminating a false proxy statement, pursuant to which those persons who comprised the class of Susquehanna common stockholders on March 29, 1967, authorized a new class of preferred stock, can be purged of all wrong and ratified by different stockholders, to wit, those persons who comprised the class of Susquehanna common stockholders on October 26, 1967, the date of issuance of a different proxy statement, pursuant to which the then common stockholders approved the issuance of the previously authorized preferred stock in consummation of a merger?

4. Whether petitioner is to be disqualified, as a class-plaintiff under Rule 23, from representing those persons who comprised the class of Susquehanna common stockholders on March 29, 1967, and who were deceived by the March 29th P. S. into authorizing a class of preferred stock, on the ground that petitioner's interest is antagonistic to the interests of that class, for the reason that pursuant to the October 26th P. S., 80% of the persons who then comprised the class of Susquehanna common stockholders, approved the issuance of the preferred shares in consummation of a merger?

5. Whether petitioner, a member of the Illinois bar, who performed professional services essential to the prosecution of this action, is disqualified as a class-plaintiff because he may share in fees, if his suit be successful, to an extent allowed by the court?

6. Whether the Court of Appeals should be permitted to go outside the record to affirm; to wit, by basing its decision upon an admission allegedly made by petitioner's counsel in un-recorded oral argument of the case on appeal, which admission petitioner's counsel in the Petition for Rehearing denied having made, when such decision terminated for all time the rights of petitioner and of the more than 9000 members of the class to sue on the deceptive March 29th P. S.?

STATUTES INVOLVED

The statutes involved are Section 14(a) of the Securities Exchange Act of 1934 (Title 15, United States Code, Section 78m). Also involved are Rule 14a-9 of the

Securities and Exchange Commission promulgated pursuant to Section 23(a) of the Securities Exchange Act of 1934 (Title 15, United States Code, Section 78w) and Rules 12(b)(6), 15(a), 15(d), 23.1 and 56 of the Federal Rules of Civil Procedure. These statutes and rules are printed in pertinent part in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner, owner of 100 shares of common stock of The Susquehanna Corporation, a Delaware corporation ("Susquehanna"), on October 18, 1967 brought this action under Rule 23(a) of the Federal Rules of Civil Procedure (the "Rules") on his own behalf and on behalf of the more than 9000 other common stockholders of Susquehanna similarly situated. Respondents were officers and directors of Susquehanna during the period covered by the complaint.

The complaint charged respondents with having caused Susquehanna to disseminate a false proxy statement dated March 29, 1967 (the "March 29th P.S."), in violation of Section 14(a) of the Securities Exchange Act of 1934 and Regulation 14(a)-9 of the Securities and Exchange Commission.

Through the March 29th P. S. respondents sought stockholder approval of a proposed amendment to Susquehanna's charter authorizing a new class of stock consisting of 3,000,000 shares of $5.00 par value preferred, the terms and preferences of which were to be fixed by respondents as the shares were issued. Responsive to the solicitation, the stockholders gave respondents sufficient proxies to effect the charter amendment.

The complaint alleged that respondents were about to seek stockholder approval of a merger of Atlantic Research Corporation, a Virginia corporation ("Atlantic"), into Susquehanna, in which Susquehanna preferred would be exchanged for Atlantic's outstanding common; that the issuance of the preferred on terms then fixed by respondents, to include, inter alia, an annual cumulative dividend of $1.00 per share, a high guaranteed value upon liquidation, conversion privileges and the like, would materially impair the common stockholders' equity position in Susquehanna and that but for the misstatements of material facts in, or the omissions of material facts from, the March 29th P. S., the Susquehanna stockholders would not have given their proxies to respondents, to create the class of preferred, nor would they have surrendered to respondents the valuable right of stockholders to fix the terms upon which a new class of stock would issue.

The complaint sought to void the proxies given pursuant to the March 29th P.S.; to enjoin the calling of a stockholders' meeting to approve a merger with Atlantic involving the issuance of preferred shares and to require a further amendment to the Susquehanna charter, removing therefrom the authorization of the class of preferred stock.

With the complaint, petitioner's counsel filed an affidavit in compliance with Rule 39 of the United States District Court for the Northern District of Illinois, stating that petitioner, a licensed attorney, had performed and would continue to perform professional services in connection with this suit and that he would participate in any legal fee to be allowed petitioner's counsel to the extent determined by the court (A. 33, 33A).

On October 26, 1967, eight days after petitioner had filed his complaint, respondents, jointly with the management of Atlantic, issued a proxy statement (the "October 26th P. S.") wherein they solicited and received sufficient proxies to approve a Susquehanna-Atlantic merger at the November 27, 1967 meetings of stockholders of both corporations. The merger was consummated in December 1967 with the exchange of Atlantic common for Susquehanna preferred, which contained the preferences substantially as set forth above.

The October 26th P.S., under the caption "Litigation Involving Susquehanna" (Vol. 1, Book of Exhibits, B-9, p. 36), referred to petitioner's suit and set forth an abridgment of the complaint, followed by the opinion of Susquehanna's counsel that petitioner's suit was without merit.

On July 1, 1968, respondents filed their answer to the complaint, pleading nine defenses including a traverse and additional defenses (A. 34-53).

On July 17, 1968, respondents filed a motion under Rule 23(c)(1) to discontinue the suit as a class action on the grounds that petitioner could not qualify as a class representative under Rules 23(a)(3) and 23(a)(4) because his claims were not typical of the claims of the class, nor could he fairly and adequately protect the interest of the class and that the majority of the class [by approving the Susquehanna-Atlantic merger] had ratified respondents' conduct about which petitioner complained, [the dissemination of the false March 29th P.S.] and had exercised an informed business judgment not to continue with petitioner's suit. Respondents' motion also asked that the complaint be dismissed on the single ground that petitioner

did not seek redress within the corporation before filing his suit (A. 54, 55). With their motion, respondents' counsel filed a memorandum of law (A. 56-83), to which were appended, as Exhibit "A," parts of the October 26th P. S. deemed relevant and, as Exhibit "B," an affidavit of the secretary of Susquehanna giving the stockholders' vote for and against the proposed merger with Atlantic.

On October 15, 1968, respondents' motion was argued orally (A. 86-144A). Before commencement of the argument the court, *sua sponte*, asked counsel to state their views on what the damages were; whether they were speculative or whether there was a genuine basis for them (A. 89, 90). This was the first time damages became an issue in the case.

Respondents argued that the rise in the market price of Susquehanna common following the Atlantic merger, negatived any damage to the common stockholders (A. 98, 101, 139). Petitioner countered that the priority of the preferred over the common, as to dividends and assets upon liquidation, impaired the common stockholders' equity position in Susquehanna and offered to produce expert testimony to prove that fact (A. 130, 131, 139).

At the conclusion of the oral argument, respondents' counsel tendered to the court a group exhibit consisting of fourteen separate documents, including affidavits by two officers of Susquehanna, aggregating more than four hundred pages of material (Vol. 1, Book of Exhibits). The court permitted the document to be filed in support of respondents' motion (A. 142). Petitioner's counsel then asked that the record show that he had had no opportunity to look at the group exhibit before it was tendered to the court (A. 143).

Immediately after respondents' group exhibit was filed, the court sustained respondents' motion on all grounds therein asserted and on the additional ground that the complaint failed to allege adequately damages to the stockholders (A. 144). Responsive to the direction of the court, respondents' counsel proposed twenty detailed findings of fact and twelve conclusions of law (A. 146-158), to which petitioner's counsel filed objections (A. 159-170).

On November 4, 1968, before the entry of the order dismissing the case, petitioner moved for leave to amend and supplement his complaint to cure what the court, on its own motion, had found to be defective in the complaint. Petitioner's motion was denied (A. 172).

On November 8, 1968, the court adopted verbatim respondents' proposed findings of fact and conclusions of law and dismissed the complaint with prejudice (A. 173-186A).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals, on the issues of causation and damages in an action under 14(a) of the Securities Exchange Act of 1934, failed to follow the law laid down by the Court in *Mills* v *Electric Auto-Lite Company*, ____U.S.____ (1970); 24 L. ed 2d 593.

The questions of causation and damages in an action under Section 14(a) of the Securities Exchange Act of

1934, were settled by the Court on January 20, 1970, with the publication of its opinion in *Mills*. While *Schy* was yet pending before the Court of Appeals, *Mills* became the law by which this action should have been decided. On January 19, 1970, one day before the Court decided *Mills*; on appeal from the Seventh Circuit, petitioner filed his petition for rehearing with the Court of Appeals. The Court of Appeals; however, chose not to follow *Mills* and, on January 27, 1970, by denying the petition for rehearing, allowed its decision, in derrogation of *Mills*, to stand.

Under *Mills*, the showing of a material misstatement or omission in a proxy statement compels the conclusion that the defect in the proxy statement was of such character that it might have affected the judgment of a stockholder who was in the process of deciding how to vote. 24 L.Ed.2d at 602, 603. The requirement of *Mills*, that the misstatement or omission be shown to be material, in principle was met in *Schy*.

The thrust of petitioner's complaint was that but for the March 29th P. S., deceptive in material respects, the stockholders would not have given their proxies to respondents to be voted in support of an amendment to the Susquehanna charter that authorized a new class of preferred and surrendered to respondents the right to fix the terms and conditions on which the preferred would issue. By the filing of respondents' motion, and for the purposes of the motion, the materiality of the misstatements and omissions in the March 29th P. S. must be taken as proved. *United States v. New Wrinkle, Inc.* (1952) 342 U.S. 371, 376; *Gardner v. Toilet Goods Association* (1967) 387 U.S. 167, 172.

Respondents' purpose in disseminating the false March 29th P. S. was to garner enough proxy support to effect the essential amendment of the Susquehanna charter. The Court of Appeals followed the error of the court in paying no heed to this fact, and thereby failed to recognize that the wrong petitioner sought to right by his complaint, was the frustration, by the false March 29th P. S., of the stockholders' right to exercise freely their corporate franchise on the issue for which their proxies were solicited. This only can account for the ruling by the Court of Appeals, that the chain of causation between the March 29th P. S. and any wrong which may have flowed therefrom, was broken by the October 26th P. S. (419 F.2d at 1117), which presented a completely different issue.

Had the Court of Appeals been attentive to *Mills*, it would have known that causation was present on the face of petitioner's complaint, that it then became petitioner's task to prove it at a trial on the merits (*J. I. Case Company* v. *Borak* (1964) 377 U.S. 426, 431), and the case should have been remanded to the court for that purpose.

The error of the Court of Appeals and of the court, in holding that petitioner suffered no damages because no shares of preferred were issued pursuant to the March 29th P. S. is equally clear. *Mills* has established that the use of a misleading proxy statement itself a violation of the law, is actionable irrespective of financial injury to the stockholders, 24 L.ed.2d at 601. If no money damages were suffered, it remained the duty of the court to fashion an appropriate remedy, to the end that for every federal wrong there be a federal remedy. *Sola Electric Co.* v. *Jefferson Electric Co.* (1942) 317 U.S. 173, 176; *J. I. Case Company* v. *Borak* (1964) 377 U.S. 426, 428.

Petitioner submits that the Court of Appeals, having in a Section 14(a) action decided the questions of causation and damages in conflict with the Court's decision in *Mills*, dispositive of those questions, a writ of certiorari should issue to correct the error of the Court of Appeals.

II. The court's total disregard of the letter of Rules 12(b)(6), 15(a), 15(d) 23.1 and 56, sanctioned by the Court of Appeals, served to deny petitioner due process of law.

On October 25, 1968, respondents submitted to the court twelve proposed conclusions of law. Number 10 of these was that "[t]he complaint fails to state a claim upon which relief can be granted. FRCP, Rule 12(b)(6)." (A. 56-158). This was ten days after the court had decided the case and was the first intimation to petitioner that respondents' motion to dismiss — on the sole ground that petitioner had failed to seek redress within the corporation before filing his complaint[1], had by mysterious judicial alchemy been converted into a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The court adopted verbatim these proposed conclusions of law (A. 183-185) over petitioner's timely objections (A. 166-170).

Rule 12(b)(6) is explicit. It empowers the court to dispose of litigation summarily and with the finality of a trial on the merits only if the conditions of the rule are met. There is no dispute as to what these conditions are: (1), the motion to dismiss must be on the ground that the

[1] A ground abandoned by respondents in the Court of Appeals (Applt's reply brief, p. 4).

complaint fails to state a claim upon which relief may be granted; (2), the motion must be made before the defendant has answered and (3), matters outside the pleading must be presented to and not excluded by the court. Only if these conditions are met may the motion become one for summary judgment, in which event, pursuant to Rule 56, due process is assured by the mandate that all parties be given reasonable opportunity to present all material made pertinent to such a motion.

Not one of the conditions precedent required by Rule 12(b)(6) was present. Nothing that transpired prior to October 25th served to put petitioner on notice that he was to be confronted — much less dismissed — by summary judgment. Respondents had moved to dismiss solely on the ground of petitioner's failure to seek redress within the corporation, a ground not within the ambit of Rule 12(b)(6)[2]. Moreover, respondents had answered the complaint before moving to dismiss, an act pre-empting summary relief under the express terms of the rule. And perhaps of most significance, petitioner was afforded no opportunity to file counter affidavits or to present other material made pertinent to a motion for summary judgment by Rule 56.

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[2]The reasoning of the Court of Appeals on this point reflects nothing short of zeal to affirm patent error. After acknowledging that a dismissal on the single ground asserted by respondents must be without prejudice, it proceeded to invoke the first of several non-sequitors, this one being that a motion to dismiss based upon lack of damages may be treated as a motion to dismiss under Rule 12(b)(6). (419 F.2d at 1115). No motion to dismiss for lack of damages had ever been made in this action and, even if such a motion had been made, the Court of Appeals knew or should have known from *Mills*, that a failure to allege monetary damage is not a ground for summary dismissal of a complaint charging the dissemination of a false proxy statement. (24 Led 2d at 603).

Petitioner seasonably objected to conclusion of law No. 10, on the ground that there had been no compliance with the requirements of Rule 12(b)(6), absent which the court could dismiss, with prejudice, only erroneously (A. 170). The objection was not sustained. On appeal the errant dismissal with prejudice was presented as a distinct issue and was argued with vigor (Applt's Br. pp. 47-50). That petitioner was given no opportunity to file counter affidavits, a mandate of Rules 12(b)(6) and 56, if a motion to dismiss is to be treated as a motion for summary judgment, the Court of Appeals passed without comment.

What were the "matters outside the pleadings presented to and not excluded by the court?" The question is not rhetorical. The record is far from clear that the group exhibit (Vol. 1, Book of Exhibits) filed by respondents in support of their motion just moments before the court decided the case (A. 142-144) were matters outside the pleadings. The Court of Appeals, nevertheless, in its zeal to affirm, accepted from that exhibit the affidavit of James W. Crowley, secretary of Susquehanna (Vol. 1, Book of Exhibits, Tab B, p. 3) which merely "identified" the October 26th P.S. (419 F.2d at 1116), as competent qualification for a 108 page document upon which the Court of Appeals substantially based its entire opinion.

The total disregard by the court of the requirements of Rules 12(b)(6) and 56, that petitioner have a reasonable opportunity to file counter affidavits to meet the thrust of the group exhibit, deprived petitioner of a right vital to the survival of his complaint.

The determination by the Court of Appeals that petitioner waived his right to file counter affidavits because

he did not object to the group exhibit as untimely is erroneous both on the facts and the law. Petitioner's counsel requested that the record show the group exhibit had just been presented and that he had had no opportunity to look at it (A. 143). Counsel's failure to use the word "untimely" does not alter the clear import of his statement. Moreover, even in the absence of vigilance, the right to file counter affidavits under these circumstances is basic to due process and is preserved by the rule itself. In *Georgia Southern and Florida Railway Company* v. *Atlantic Coast Line Railroad Company*, 373 F.2d 493 (5 Cir. 1967) the Court said at 498:

> "The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforceable thrust with no chance to parry. Notice is ascendant and primary in the Federal Rules. They do not tolerate foils of obfuscation."

There are left then to consider as "matters outside the pleadings" only Exhibits "A" and "B", which respondents attached to the memorandum of law filed with their motion. Exhibit "A" consisted of selected parts of the October 26 P.S., deemed relevant by respondents. Exhibit "B" was an affidavit by James Crowley, Secretary of Susquehanna, which only certified the vote on the Atlantic merger. These exhibits are before the Court in Vol. 2, Book of Exhibits.

Respondents contended in the Court of Appeals that Exhibits "A" and "B" were matters outside the pleadings (Aplees' Br., p. 37). This clearly could not be so because

the two exhibits were attached to respondents' memorandum of law, which was itself attached to and made a part of respondents' motion by the express provisions thereof (A. 55). Because respondents grounded their motion, inter alia, on ". . . other reasons more fully set forth in the attached memorandum" (A. 55), petitioner construed the memorandum, with Exhibits "A" and "B" expressly made a part thereof, as a part of the pleading rather than as "matters outside the pleadings presented to and not excluded by the court". Petitioner's construction is logical and reasonable. But even if it was erroneous it did not afford a basis under the Rules to deprive petitioner of his day in court:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson* (1957), 355 U.S. 41, 48.

Even in retrospect, whether Exhibits "A" and "B" were part of or outside the pleadings is not clear. But in retrospect, the studied ambiguity with which they were proferred by the respondents and the alacrity with which the court put them to such devastating use makes it clear that both the respondents and the court employed the Rules as a snare, a practice condemned by the Court in *Surowitz* v. *Hilton Hotel Corp.*, (1966) 383 U.S. 363, 373:

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large

> part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

In addition to the court's abuse of Rules 12(b)(6) and 56, its abuse of other Rules served to deny petitioner his day in court. Respondents' sole ground for dismissal of the complaint was the failure of petitioner to seek redress within the corporation before filing his action (A. 55). This was expanded in their memorandum of law (A. 81, 82) and in their argument before the court (A. 97) to mean, inter alia, that petitioner was obligated to lay his grievances before the directors or stockholders of Susquehanna and that only after they had refused to bring an action could petitioner proceed on his own. The court, persuaded by this argument, found that petitioner had failed to ask the directors or stockholders to take action against respondents (Finding No. 16) and concluded that petitioner was therefore estopped to bring this action (Conclusion of law No. 7, A. 184).

Petitioner's action was a class action, governed by Rule 23, and not a derivative action, governed by Rule 23.1. The application of Rule 23.1 only to derivative suits is so clear that the court's extension of that Rule to support the dismissal of this class action evidences a flagrant disregard for the Rules, a disregard shared by the Court of Appeals, which refused to face this issue, squarely

raised by petitioner, and which instead begged the question by holding that prematurity of suit may be raised by summary judgment (419 F.2d at 1115).

Respondents' other prematurity argument, that petitioner did not pursue his rights under Rule 14a-8 of Regulation 14 of the Securities and Exchange Commission, is completely without merit (Cf. Applt's Br., pp. 36, 37) and was abandoned by respondents in the Court of Appeals (Cf. Applt's Reply Br., p. 4).

The court's denial of leave to petitioner to amend and supplement his complaint under Rule 15(a) and 15(d), because it came too late (Tr. Nov. 7, p. 7), was, under the facts of this case, a denial of the mandate of the rule, that leave to amend shall be freely given when justice so requires. *Foman* v *Davis*, (1962) 371 U.S. 179, 182.

Although "due process" is an elusive concept (*Hannah* v *Larche*, (1960) 363 U.S. 420, 442), it is fundamental to that concept that a litigant have an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. *Anderson National Bank* v *Luckett*, (1944) 321 U.S. 233, 246; *Schroeder* v *New York*, (1962) 371 U.S. 208, 211; *Mullane* v *Central Hanover Bank and Trust Company*, (1950) 339 U.S. 306, 314.

Petitioner submits that the court and the Court of Appeals have so far departed from the accepted and usual course of motion practice as to amount to a denial of procedural due process to petitioner. The serious charges of fraud in petitioner's complaint, amplified in his

amended and supplemental complaint, are now not to be heard because the court and the Court of Appeals have virtually nullified the Rules.

The Court has been vigilant to enforce these Rules to insure the orderly and just conduct of litigation in the federal courts. *Los Angeles Brush Manufacturing Co.* v. *James*, (1927) 272 U.S. 701, 707; *La Buy* v. *Howes Leather Co.*, (1957) 352 U.S. 249, 256. The courts need to be reminded that the Rules bind them as well as litigants. Vigilance should require that a writ issue here; otherwise petitioner will have been deprived of his day in court.

III. The interpretation of Rule-23 by the Court of Appeals, respecting the qualification of a class representative, is in conflict with the law prevailing in the Second Circuit.

The decision of the Second Circuit in *Eisen* v *Carlisle & Jacqueline*, 391, F.2d 555 (1968), on the question of the qualifications of the class representative under Rule 23 as it exists today, has been followed by many courts, including the Seventh Circuit (*Hohmann* v *Packard Instrument Company*, 399 F.2d 711 (1968), and must be regarded as a leading case. The Seventh Circuit in *Schy*, however, departed from *Eisen* and from *Hohmann*, leaving conflict in its wake, which should be resolved by the Court.

Eisen urged that Rule 23 be given a liberal rather than a restrictive interpretation and abhorred the quick disqualification of a class plaintiff, saying that "* * * the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing

to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself." (391 F.2d at 546).

Eisen was brushed aside by the court when it did not, in the first instance, look to the rule itself. The rule requires only that the claims of the representative be typical of the claims of the class and that the representative will fairly and adequately represent the class. By these standards petitioner was a qualified representative. The complaint charged that petitioner's right to the free exercise of his corporate franchise was denied him by the false March 29th P.S. If the March 29th P.S. were in fact false, and it must have been so taken for the purposes of respondents' motion, petitioner's claim was typical, albeit identical, with the claim of every other person who owned Susquehanna stock on March 29, 1967. But the court went beyond the rule itself and considered additional circumstances and facts.[3] This was approved by the Court of Appeals (419 F.2d at 1116) and it is in this respect that *Schy* is in conflict with *Eisen*.

The court determined that stockholder approval of the Susquehanna-Atlantic merger, pursuant to the October 26th P.S., *a priori* established petitioner's interests to be antagonistic to the interest of the class. To have made this determination the court had to resolve other questions of fact and of law, some of sweeping effect.

Were the stockholders fully informed by the October 26th P.S.? The October 26th P.S. was a printed document.

[3] At the posture of the case before the court, the court was not passing on questions of fact. "* * * we are not here on the question of facts * * *" (A. 142, 143).

of 108 pages. Under the caption "Litigation Involving Susquehanna", respondents published a terse and complex summary of the allegations of petitioner's complaint, concluding with the short and simple opinion of counsel for Susquehanna that petitioner's suit was without merit. The court could only guess to what extent more than nine thousand stockholders, some of them surely uneducated and unsophisticated, were persuaded against petitioner's position by counsel's opinion that his suit was without merit. Yet to have held that the October 26th P.S. fully informed the stockholders of petitioner's claims, the court had to assume that counsel's opinion was totally without effect. The basis for such an assumption raises a question, since there were no facts of record to aid the court.

Who were the members of the class? Petitioner represented the class made up of stockholders on March 29, 1967. Susquehanna stock was actively traded on the American Stock Exchange. Reason would support the conjecture that many persons who owned the stock on March 29th were not stockholders on October 26. The "class" of stockholders surely changed in seven months. But to have repudiated petitioner as representative of the March 29 stockholders, the court had to conclude that no change in the class membership had occurred.

Can stockholders, however informed they may be, ratify an act declared by Congress to be against the public policy of the United States? Respondents contended that the stockholders ratified their conduct, about which petitioner complained in his suit (A. 54), when, pursuant to the October 26 P.S., they approved the issuance of preferred stock in the Atlantic merger. The conduct about which petitioner complained was respondents' dissemina-

tion of the false March 29th P.S., an act made criminal by the federal securities law and against the public policy of the United States. *No court before the court in* Schy *has ever held that such an act could be ratified.* Under *Schy*, it is now the law that the dissemination of a false proxy statement can be purged of all wrong by a subsequent proxy statement relating to a different issue and issued many months later to a different group of stockholders. Any semblance of such doctrine threatens to have a profound effect on the enforcement of Section 14(a).

The court also faulted petitioner as a class plaintiff, put him in a class separate from that of all other Susquehanna stockholders, because his counsel had agreed to share with him, subject to the approval of the court, any fee which might have been allowed petitioner's counsel upon a successful prosecution of this case. Petitioner, an attorney licensed to practice law in Illinois, had performed and would continue to perform professional services in connection with the case. The value of his services, as evaluated by the court, would measure the extent of his fee participation. Had the court followed *Eisen* or *Hohmann* and looked to Rule 23 to judge petitioner's capacity to represent the class, petitioner would not have been disqualified. That a class plaintiff-attorney might receive a fee does not make his claim atypical of the claims of the class nor does it diminish his ability to protect the interests of the class fairly and adequately, the criteria of the rule.

The Court has recognized in *J. I. Case Company* the importance of the class and derivative suit as an adjunct to the Securities and Exchange Commission in the enforcement of the federal securities laws. Derivative and class

actions are characteristically difficult and prolonged. Very few attorneys are willing to undertake them without substantial retainer-fees. That requirement eliminates, for the most part, all but the affluent litigant. Petitioner in this instance was able to retain counsel only on the condition that he, as an attorney, would assist them with the case. In the light of the purpose of the securities laws, there is cruel irony in the finding below, sanctioned by the Court of Appeals, that a small stockholder who happens to be professionally equipped to protect his interests and those of other small stockholders is disqualified on the ground that the mere contemplation of a fee, in the event he proved that management had bilked the stockholders, created a conflict of interest between him and the other stockholders.

Lawyers are frequently owners of stock. The securities laws extend to the protection of their interests as stockholders as well as to others. No reasonable reason exists to disqualify them as class plaintiffs because they may be paid a fee for professional services rendered in the case. To so disqualify them unreasonably deprives a large group of persons from suing in a representative capacity. It militates against the purpose of the securities laws.

The court decided these many questions of fact based upon the skimpiest of affidavits, which at best did no more than identify the October 26th P.S. (419 F.2d at 1116). This was the very pitfall *Eisen* warned against and points to the wisdom of that decision. Petitioner submits that *Eisen* and *Schy* are in conflict on a question important to all class actions that may be hereafter brought, a conflict which should be resolved by the Court.

IV. The decision of the Court of Appeals, based as it was upon a disputed admission not of record and, hence, beyond review by the Court, represents such departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

Three times in its opinion the Court of Appeals stated that petitioner's counsel, at the oral argument of the appeal, admitted that the October 26th P.S. was accurate, complete and fair. Both on the question of the court's summary dismissal of the complaint with prejudice under Rule 12(b)(6) and on the question of causation (419 F.2d at 1116, 1117), the Court of Appeals relied heavily upon this alleged admission as a basis to affirm.

It was a matter of consequence to petitioner that the reality of the alleged admission did not go unchallenged. In the Petition for Rehearing filed in this cause, petitioner's counsel denied having made the admission, or having made any statement tantamount to such admission, and recalled to the Court of Appeals his characterization of the October 26th P.S. as a document " . . . shot through with lies or words of similar import." (Petn. for Rehearing, p. 10).

No transcripts are made of oral arguments in the Seventh Circuit. Even assuming *arguendo* the admission was made, it is not known whether it was made in the heat of argument, or responsive to a question by one of the judges; whether it was distinct and formal, for the purpose of dispensing with proof of some fact, or made under other circumstances or for other reasons. Circumstances

such as these, none of which are known here, are essential to a determination of whether a case may turn upon an admission by counsel. *Howard Industries, Inc.* v. *Rae Motor Corporation*, 186 F.Supp. 469, 471 (E.D. Wis. 1960); 31 C.J.S. Evidence 361, pp. 1136, 1137.

It is of record, however, that petitioner's counsel denied having made the admission and without it the Court of Appeals would have been even more hard pressed to affirm. Petitioner submits that a decision of a Court of Appeals, dependent upon the fact of an admission that has been formally denied and which cannot be proved in the absence of a record, and which therefore cannot be reviewed by the Court, should not be permitted to stand.

V. The decision by the Court of Appeals, in that it worsens the disadvantages already imposed by the system on any dissident stockholder who takes his complaint against management to court, offends the concept of "fair play" basic to the American system of jurisprudence and should not be allowed to stand.

The system is such that any dissident stockholder who takes his complaint to court is greatly disadvantaged. At the inception, he must retain counsel out-of-pocket whereas management is defended out of the corporate till. As pointed out elsewhere in this petition, this alone serves in most instances to eliminate all but the affluent and greatly reduces the effectiveness of private litigation as an adjunct to the work of the Securities and Exchange

Commission. In this case, respondents' general counsel is an attorney with enormous experience and political influence. His experience in the defense of management charged by the government and by stockholders with violating the securities laws is described in the October 26 P.S. (Vol. 1, Book of Exhibits, B-9, pp. 46-49). His political influence is a matter of common knowledge of which the Court can take judicial notice. On September 30, 1968, which happened to be the day before this case was argued before the Court of Appeals, the *Chicago Daily News* carried a nationally syndicated article which stated in part, "His is the firm to do business with if you want to get through to the present administration." The *Wall Street Journal* on February 7, 1969 included among the assets of his law-firm " . . . the confidence of officials who count and speedy access to their offices to present a client's case."

Petitioner makes no claim that respondents' case was presented anywhere but in the courtroom. However, the decision by the Court of Appeals, in disqualifying petitioner as a class plaintiff and thereby depriving more than 9,000 stockholders of any representation, on the motion of respondents who not only admitted the wrong to stockholders complained of, but who are represented by counsel of such power and prestige, serves to worsen the disadvantages already imposed by the system on any dissident stockholder who takes his complaint to court.

In this respect the decision by the Court of Appeals opposes the purpose of the securities law and offends the concept of "fair play" that is basic to the American system of jurisprudence. It should not be allowed to stand.

CONCLUSION

The decision by the Court of Appeals reflects a gap between purpose and practice in the adjudication of the rights of dissident stockholders pursuant to the securities laws.

In allowing the interests of more than 9,000 stockholders to stand unprotected against the admitted wrongdoing of the respondents, in order to disqualify petitioner as a class plaintiff, it squarely contravenes the purpose of the securities laws.

In depriving a large class of stockholders, namely attorneys, of the right to sue in a representative capacity because they may receive a fee for the work they perform, it greatly reduces the effectiveness of private litigation as an adjunct to the work of the Securities and Exchange Commission.

It sanctions the abuse of the federal rules to the extent that petitioner has been deprived of due process of law.

It warrants the granting of certiorari by the Court.

Respectfully submitted,

Maurice H. Schy
Petitioner pro se
9225 Collins Avenue
Surfside, Florida 33154

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1969 September Session, 1969

No. 17,393

MAURICE H. SCHY,

Appellant,

v.

The Susquehanna Corporation, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Appellees.

January 5, 1970

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before KNOCH and CUMMINGS, *Circuit Judges*, and GORDON, *District Judge*.

GORDON, *District Judge*.[1] This action was brought

[1]The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

for equitable relief from an alleged violation of §14(a) of the Securities and Exchange Act, 15 U.S.C. §78n, and the applicable regulation. The district court dismissed the complaint with prejudice and denied leave for the plaintiff to file an amended complaint.

The plaintiff is one of 9,145 stockholders of the Susquehanna Corporation. In his complaint, he has alleged that Susquehanna issued a false and misleading proxy statement on March 29, 1967. The purpose of that statement was to obtain stockholder approval of a proposed new issue of Susquehanna preferred stock. The plaintiff claimed that Susquehanna failed in the proxy statement of March 29 to inform stockholders of a planned merger with Atlantic Research Corporation and of the intended use of the new preferred stock to carry out such merger.

Although a majority of the shares outstanding were voted to approve the new stock issue, no preferred shares were issued pursuant to the proxy statement of March 29. On August 2, 1967, the board of directors of Susquehanna approved a merger with Atlantic Research Corporation; on October 18, 1967, the plaintiff filed his complaint.

On October 26, 1967, Susquehanna and Atlantic issued a joint proxy statement. Like Susquehanna's proxy statement of March 29, this joint proxy statement also sought authorization for a new issue of preferred stock. The proxy statement also outlined the stock's contemplated use in effectuating the merger of the two companies, and it fully described the terms of the proposed new issue of the stock and of the merger. It further described, in ample detail, the plaintiff's pending law suit. At the oral argument of this appeal, the plaintiff's counsel acknowl-

edged that the joint proxy statement was accurate and complete. On November 27, 1967, the stockholders approved the plan described in the joint proxy statement dated October 26 by a vote of 80.8% to 0.42%.

The plaintiff filed a motion for summary judgment which he thereafter withdrew but later renewed. The defendants also filed a motion in which they applied for an order that the plaintiff could not maintain his action as a class action and also to dismiss on the ground that the plaintiff had failed to seek redress from the stockholders before instituting his action.

Following a hearing on the defendant's motion, the district judge rendered an oral opinion granting such motion on the grounds stated in the motion and on the additional ground, raised at the oral argument, that the plaintiff, as a matter of law, was unable to show any damage resulting from the alleged fraudulent proxy statement. Later, a judgment was entered dismissing the action on the merits.

The plaintiff owns 100 shares of Susquehanna stock. He is an attorney and has aided in preparation of this suit. He has an arrangement with his attorneys whereby he will share in the attorneys' fees should he prevail in the action.

I. PROBLEMS OF MOTION PRACTICE

The plaintiff contends that the defendants' motion could not be construed as a motion under rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. For that reason, he argues, the motion could not be treated as a motion for summary judgment under rule 12(b). We reject this contention.

The defendants' motion charged that the plaintiff's suit was premature for failure to seek redress within the corporation. Prematurity may be raised on a motion to dismiss under rule 12(b)(6), but a dismissal granted upon this ground alone must be without prejudice. *Tademy v. Scott et al*, 157 F.2d 826, 828 (5th Cir. 1946); *Van Horn v. State Farm Mutual Automobile Insurance Co.*, 283 F. Supp. 260, 261 (E.D. Mich. 1966), affirmed 391 F.2d 910.

In addition, a motion to dismiss based upon a lack of damages, may properly be treated as a motion to dismiss under rule 12(b)(6). In *Premier Malt Products Co. v. Kasser*, 23 F.2d 98, 99 (E.D.Pa. 1927), the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, *Citrin v. Greater New York Industries*, 79 F. Supp. 692, 694-5 (S.D.N.Y. 1948); *Package Closure Corporation v. Sealright Co.*, 4 F.R.D. 114, 116 (S.D.N.Y. 1943). The plaintiff states that defendants were not entitled to raise the question of damages at the hearing on their motion. The matter of damages would appear to have been improperly raised at the hearing as a ground for dismissal since the defendants had not mentioned it in their notice of motion. See *McNichols v. Lennox Furnace Co.*, 7 F.R.D. 40, 42-3 (N.D.N.Y. 1947). However, the plaintiff fully argued this ground at the hearing and cannot complain here that the district court considered it. *DeLorenzo v. Federal Deposit Insurance Corporation*, 268 F.Supp. 378, 381 (S.D.N.Y. 1967); *Interlego, A. G. v. Leslie-Henry Co.*, 214 F.Supp. 238, 240 (M.D. Pa. 1963).

The plaintiff also contends that even if properly construed as a motion to dismiss under rule 12(b)(6), the defendants' motion may not be treated as a motion for summary judgment since it was made after the answer had been filed. This argument is without merit. A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one. *United States for Use of E. E. Black Limited v. Price-McNemar Construction Co.*, 320 F.2d 663, 664 n. 1 (9th Cir. 1963); *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir. 1945). Cf. *In re Union National Bank & Trust Co. of Souderton, Pa.*, 287 F. Supp. 431, 433 (E.D. Pa. 1968). Rule 12(c) concerns motions "after the pleadings are closed" and specifically provides that a motion for judgment on the pleadings filed with supporting affidavits may be treated as a motion for summary judgment.

The plaintiff next complains that the district court erroneously considered affidavits and exhibits filed on the day of the hearing in violation of rule 6(d), Federal Rules of Civil Procedure. The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal.

The plaintiff further contends that the district court should not have considered the October 26, 1967 proxy statement in rendering its decision. He argues that the copy filed in support of the defendants' motion did not comply with the requirements of rule 56(e) and, thus, did not constitute a sufficient affidavit. We reject the plaintiff's contention. The plaintiff has admitted that the Octo-

ber 26, 1967 proxy statement is complete and accurate; he does not deny that the copy submitted with the motion is an accurate copy of the October 26, 1967 proxy statement. An officer of Susquehanna in a separate affidavit identified the attached proxy statement. In *Pollack v. City of Newark, N. J.*, 147 F.Supp. 35, 39 (D. N.J. 1956), affirmed 248 F.2d 543, certiorari denied 355 U.S. 964, the district court said:

> "Moreover in considering a motion for summary judgment, the court is entitled to consider exhibits and other papers that have been identified by affidavit or otherwise made admissible in evidence."

See *Barker* v. *Summey*, 185 F. Supp. 298 (N.D. Ind. 1960); *Hartford Accident and Indemnity Co.* v. *Flanagan*, 28 F. Supp. 415 (S.D. Ohio 1939).

Finally, the plaintiff urges that the district court should not have made a determination under rule 23(c), Federal Rules of Civil Procedure, as to whether the plaintiff could maintain his suit as a class action without having first given notice to members of the class that the court planned to make such a determination.

The Committee Note of 1966, quoted in 3B, *Moore's Federal Practice*, ¶23.01[11.-1], page 23-32, states:

> "Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2)."

In our opinion, the trial court did not abuse its discretion by refusing to order that notice be given of its intention to make a determination when every member of the class has already received a proxy statement containing a full, accurate and complete description of the pending action. Cf. *Snyder* v. *Board of Trustees of the University of Illinois*, 286 F. Supp. 927, 931 (N.D. Ill. 1968).

In conclusion, we hold that the procedure followed by the district court in granting summary judgment did not involve reversible error. We will now consider the propriety of the substantive rulings.

II. MAINTENANCE OF CLASS ACTION

The plaintiff contends that he could properly represent the class. We disagree and hold that the district court correctly found that this action could not be maintained as a class action.

In determining the adequacy of representation, the district court is not confined to the specific procedure outlined by rule 23. It was proper to consider the additional circumstances and facts of the case. After being fully informed of the nature of the plaintiff's pending suit, 80.8% of the stockholders voted in favor of the proposal made in the October 26, 1967 proxy statement, thereby approving the issuance of preferred stock for use in effectuating the merger. Only 0.42% voted against it. Since over eighty percent of the class voted in favor of the proposal of which the plaintiff's suit complains, and they did so with full knowledge of the plaintiff's suit, it is somewhat difficult for the plaintiff to claim that he represents the class.

The plaintiff cannot maintain his action as a class suit when his interests are antagonistic to the interests of the persons he purports to represent. *Hansberry* v. *Lee*, 311 U.S. 32, 44-5 (1940); *Carroll* v. *American Federation of Musicians of U.S. and Can.*, 372 F.2d 155, 162 (2d Cir. 1967), judgment vacated on other grounds, 391 U.S. 99 (1968); *Troup* v. *McCart*, 238 F.2d 289, 294 (5th Cir. 1956).

III. CAUSATION

The defendants maintain that the district court found that the October 26, 1967 proxy statement broke the chain of causation between the earlier proxy statement and any damage allegedly caused by it. The plaintiff denies that this issue was raised in the district court and objects to considering it on this appeal; he insists that causation is a fact issue which must be settled by a trial.

Since this issue can be resolved on the basis of affidavits which were filed in the district court and were considered in its decision, it may be raised and settled here. In *Reinstine* v. *Rosenfield*, 111 F.2d 892, 894 (7th Cir. 1940), the court said:

> "From time immemorial Courts of Appeal have been authorized to affirm the rulings of lower courts for any valid reason based upon the evidence, although not assigned."

No shares of preferred stock were ever issued pursuant to the March 29, 1967 proxy. The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 proxy, which the plaintiff admits was fair and complete.

Under the foregoing circumstances, we believe the district court correctly held that as a matter of law, no damage was caused by the March 29, 1967 proxy. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-1 (1964) and *Mills* v. *Electric Autolite Company*, 403 F.2d 429, 435-6 (7th Cir. 1968), certiorari granted, 394 U.S. 971, referred to by the plaintiff, are distinguishable in that they involved factual disputes. Compare also *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7th Cir. 1969). Here there was no influence from the March 29, 1967 proxy statement which was unremedied by the October 26, 1967 proxy statement.

IV. CONCLUSION

Shortly before the beginning of oral argument, counsel for the defendant submitted certain documents to the court with the request that the court consider them in connection with this appeal. Counsel for the plaintiff objected to this offer on the ground that it was not timely made. The court is of the opinion that the objection of the plaintiff is well taken and, accordingly, has not considered such documents in deciding this appeal.

Since we find sufficient grounds to support the judgment of the district court, it is unnecessary to consider certain other lesser errors which the appellant has raised.

The judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

CITED STATUTES

SECURITIES ACT OF 1934 (15 U.S.C.A. §78a-78hh-1)

"PROXIES

Sec. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title."

GENERAL RULES AND REGULATIONS OF THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1934 (17 CFR 240)

"REGULATION 14A

SOLICITATION OF PROXIES

* * *

Rule 14a-8. Proposals of Security Holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter

specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a-4(b). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This rule does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address

of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a-6(a). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement."

"Rule 14a-9. False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.A.)

"Rule 12. Defenses and Objections — When and How Presented — by Pleadings or Motion — Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

"Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

"Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if *** (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

"Rule 23.1. Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivation action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

"Rule 56. Summary Judgment.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing advidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."